In the instant case in the said clause (c) of the declaration made by Azian in her proposal for assurance, reference is made to the application of "terms of the receipt" in the event payment of premium is made in cash. This is followed by a receipt on the face of it the purpose for which the money was paid or received is not stated and on the reverse of it in large print are the words "Conditions of Payment" followed by the conditions that have been reproduced earlier in the judgment. In my judgment in the circumstances obtaining in this case the $118.00 was received by AIA subject to those conditions. Accordingly the receipt of that amount does not amount to a waiver of the understanding between Azian and AIA set out in the said clause (c) of the declaration in the proposal that the assurance applied for was not to take effect until a policy was issued and delivered to Azian and the first premium actually paid in full. No policy was issued and accordingly there was no delivery. Further there is no evidence as to how much the premium was and what the $118.00 represented.

In my judgment at the time of the premature death of Azian there was no concluded contract of insurance between her and AIA and accordingly the claim fails. It is dismissed with costs.

Claim dismissed.

Solicitors: *Yacob, Woon & Rakan-Rakan; Skrine & Co.*

HARPER GILFILLAN (1980) SDN. BHD. v. KEAN TOH AMANG FACTORY SDN. BHD. & LEE KWEE HONG (CLAIMANT)

[O.C.J. (George J.) June 11, 1985]

[Kuala Lumpur – Application for Execution No. 432 of 1983]

Sale of Goods – Sale and agreement to sell – Property does not pass to the buyer in an agreement to sell – Only a right in personam is created.

Contract – Sale of land to run a factory – Permission of Mentri Besar required – Requirement of obtaining licence – Sale illegal & void.

Practice and Procedure – Seizure of movable goods in execution proceedings – Goods belong to judgment debtor even though there is an agreement to sell.

In this case the plaintiffs obtained judgment against Kean Toh Amang Factory Sdn. Bhd. (first defendant) in the sum of $46,000 which with interest stood at $48,507 unpaid. The plaintiffs caused a writ of seizure and sale to issue and the bailiff seized a number of movable goods at Amang factory. Later on one Lee Kwee Hong (claimant) filed an Order 17 rule 2 notice claiming all the goods seized as his own. He relied on a written sale and purchase agreement of an earlier date. According to their agreement, the defendant had agreed to sell the land and factory with movables for $280,000 to the claimant. The land could not be sold without the consent of Mentri Besar. The agreement provided in case the consent is not forthcoming, the agreement would be treated as null and void. The judgment creditor contended that on the date of seizure the Mentri Besar's consent had not been obtained, therefore property in the movables was still with the judgment debtor. He also contended that the sale was not *bona fide* as the two shareholders of the defendant company were the sister and sister's daughter of the claimant. The claimant told the court that he was not aware of any judgment debt against the defendants.

Held: (1) property in the movables did not pass to the purchaser on December 19 when they were seized by the bailiff;

(2) the agreement was a conditional agreement subject to the consent of Mentri Besar and the consent had not been given on the date of seizure of movables.

APPLICATION FOR EXECUTION.

Gurdial Singh for the claimant.
K. Kangasingam for the judgment creditor.

George J. : On August 22, 1983 in Kuala Lumpur High Court Civil Suit No. C 941 of 1983 Harper Gilfillan (1950) Sdn. Bhd. (Harpers) obtained judgment against Kean Toh Amang Factory Sdn. Bhd. in the sum of $46,000.00, interest and costs which on December 8, 1983 together stood at $48,506.92 unpaid. On that date Harpers caused a writ of seizure and sale to issue in respect of certain movable property which Harpers were to identify as belonging to the judgment debtor.

Pursuant to the said writ of seizure and sale, on December 19, 1983, the Bailiff of the Court seized a number of movable goods at an Amang Factory at the 18th mile Bota/Ipoh Road, Tronoh, Perak upon the factory and movables therein being identified by a representative of Harpers as being that of the judgment debtor.

On December 23, 1983 one Lee Kwee Hong filed an Order 17 rule 2 Notice (Form 28) claiming all the items seized. Harpers refused to admit the claim by the claimant and the Sheriff of the Court accordingly had to and applied for an Interpleader

Summons to issue which summons was disposed of on April 6, 1985 when the claimant's claim was rejected with costs and the necessary orders consequent thereto were made.

In filing the Form 28 notice the claimant was required to set out therein the grounds of the claim. The claimant relied on a written sale and purchase agreement dated October 20, 1983 a copy of which was exhibited. The parties to this agreement were the judgment debtor company and the claimant. By it, in consideration of $50,000.00 said to have been paid on October 20, 1983 to the judgment debtor company by way of deposit and part payment towards the purchase price, the judgment debtor company agreed to sell to the claimant its licence to run an Amang Factory (issued by the Mines Department), the Amang Factory (that was on the land held under H.S.(D) Ka 1789/78 for P.T. No. 37 in the district of Kinta) together with the machinery installed in the factory, as well as the said land on which the Factory stood, all for $280,000.00.

Clearly the purported sale of the licence was illegal and void. Apart from that apparently there was a condition attached to the land that it could not be sold without the consent of the Menteri Besar of the State of Perak. However, it was a term of the sale and purchase agreement that the vendor would immediately apply to the Menteri Besar for his consent to sell and transfer the land to the purchase and Clause 4 of the agreement provided that in the event the Menteri Besar's consent could not be obtained the vendor was obliged to refund the said deposit of $50,000.00 to the purchaser and that the agreement would in those circumstances be treated as null and void and of no legal effect. Completion of the sale was to take place upon payment of the balance of the purchase price which was to be paid within 14 days of the purchaser being notified that the aforesaid consent of the Menteri Besar had been obtained. The parties had also agreed that upon execution of the agreement and pending completion the purchaser was to be permitted to enter into and run the Amang Factory as his own but was required during the existence of the agreement to keep and maintain the machinery (in the factory) in good and working condition at his own cost. Once the Menteri Besar's consent was obtained the vendor was required to apply for the Amang licence to be issued in the purchaser's name.

For the judgment creditor, it was contended that the sale and purchase agreement was a conditional agreement conditional on the obtaining of the Menteri Besar's consent for the sale of the land and that as on the date of the seizure of the movables such consent had not been obtained the property in the said movables had not passed from the vendor. It was also contended that in any event the purported sale was not *bona fide* and was not genuine and was entered into with the intent to try and thwart the judgment creditor from recovering the fruits of its judgment. The affidavit of the judgment creditor's General Manager Goey Seong Hee (enclosure 25) revealed the startling fact that the only two shareholders of the judgment debtor company were the sister of the claimant and her daughter! Goey contended that the claimant must have known of the judgment that had been obtained against the company of his sister and her daughter and of the probability of execution proceedings.

In a supplementary affidavit affirmed on May 2, 1984 (enclosure 31) the claimant repeated that he had bought the Factory, the machinery therein and the land on which the Factory stood and that he had paid in full the whole of the purchase price of $280,000.00. He also said that pending the transfer of the Amang licence to him the vendor had appointed him Manager of the Factory. However no specific attempt was made by the claimant to deny the allegation made by Goey that he must have known of the debt owing to the judgment creditor in respect of which just two months before the sale and purchase agreement had been entered into the judgment creditor had obtained judgment and that he must have had actual or constructive notice that execution proceedings may be commenced. No suggestion was made nor any explanation given in the affidavits filed as to why that was not or could not have been the position.

At the hearing of the Interpleader Summons the claimant Lee Kwee Hong testified. Now for the first time he came out with the information that two of the more expensive items attached in the factory had been purchased by him from a third party after October 20, 1983. He produced what was purported to be a receipt in respect of the purchase price for these items but the makers of the receipt were not called. Further, although the sale and purchase agreement was held out to have a schedule of movables purchased with the factory that list *was left out* of the copy of agreement exhibited in Court. I was far from satisfied that that receipt was genuine.

Lee also testified that the required consent to transfer the land to him was finally obtained on June 1, 1984. He produced receipts showing that he had paid the full amount of $280,000.00. But as was pointed out by Encik K. Kanagasingam of counsel for the judgment creditor contrary to what Lee had stated in his affidavit of May 2, 1984 that he had prior to May 2, 1984 paid the full amount of $280,000.00 it was seen from the receipts that a sum of $170,000.00 of that amount was only paid on June 14, 1984 proving that Lee had lied. On the whole I considered Lee's evidence to be unreliable to say the least. When he felt he was cornered when cross-examined about the contents of one of the affidavits affirmed by him and read at the hearing he went to the extent (no doubt to the great embarrassment of his solicitors) of saying that he had affirmed it without knowing what its contents were! I found certain aspects of the claimant's contentions incredible: for instance, that the $280,000.00 was paid in cash – It was said that the vendor wanted the payment in cash. This did not make sense to me and particularly as the sale and purchase agreement provided for the balance to be paid through a third party (the accountant) I found it difficult to accept that payment in cash was asked for by the vendor and that the purchaser had agreed to pay that large amount in cash. No acceptable explanation for this made of payment was given. I was left in doubt as to whether in fact the payments said to have been made had in fact been made.

In giving evidence the claimant sought to persuade the Court to accept that he was not aware at all relevant times of the amount owing to the judgment creditor. This he said was because he had not been on speaking terms with his sister for some twenty years. That he did not reveal this earlier when he filed affidavits is significant and in any event against that alleged lack of cordial relationship with his sister is seen that the sister in October 1983 gave her brother an unfettered general power of attorney [exhibit LKH-3 to Lee Kwee Hong's affidavit of May 2, 1984 (enclosure 31)] couched in the widest of terms, an instrument that would not have been executed and delivered unless there was complete and absolute trust between the donor and donee which it would have been unlikely to exist between a brother and sister who have not been on speaking terms for years!

Another matter that I found incredible was the claimant saying that he had not been concerned to know what liabilities the judgment debtor company had. He is seen however to use part of the alleged purchase price to pay off the bank that had a claim on the land by way of a charge. It seemed to me an implausible story that anybody *bona fide* buying a factory lock stock and barrel together with the land on which it stands would not enquire into the liabilities of the company.

Even Chan Kon Yin, as dubious a witness that you can have, called on behalf of the claimant, conceded that had he been buying the factory he would have insisted on checking on its assets and liabilities. He would have insisted on looking at the company's books which obvious and natural thing to do the claimant did not do.

I was far from satisfied that the purported sale was *bona fide*. On the contrary I was satisfied that in all probability it was a simulated sale with the purpose of defeating execution proceedings that may be instituted by the creditors of the judgment debtor.

On that finding the claimant's claim fails. In any event the claim had to fail on the ground that the property in the movables did not pass from the vendor to the purchaser on December 19, 1983 when they were seized by the Bailiff. The agreement was a conditional agreement and its terms were clear – a condition precedent to completion of the contract was the obtaining of the consent of the of the Menteri Besar by the vendor. On December 19, 1983 that condition had not been met and accordingly on the express terms of the agreement there had been no passing of property. Clause 4 of the agreement makes that abundantly clear. Neither the claimant nor his counsel had an answer to the question that was asked in the course of the proceedings "What about clause 4?" The contract was clearly an executory contract as on December 19, 1983. It is sufficient to read from *Chalmers'* Sale of Goods (17th Edition) at page 84.

> "The term 'contract of sale' thus includes both actual sales and agreements for sale. It is important to distinguish clearly between the two classes of contract. An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple; whereas a sale, or, as it is called for distinction, an executed contract of sale, is a contract plus a conveyance. By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* also is transferred. Where goods have been sold (even though not delivered), and the buyer makes default, the seller may sue for the contract price on the count of "goods bargained and sold", but where an agreement to buy is broken, the seller's normal remedy is an action for unliquidated damages. If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes; they may be taken in execution for his

debts, and, if he becomes bankrupt, they pass to his trustee. . . ."

Pollock & Mulla (4th Edition) says the same thing at page 35.

"An agreement to sell, which is also called an executory contract of sale, is a contract simply, and creates only a *jus in personam;* the property in the goods which form the subject-matter of the contract remains in the seller, so that they may be taken in execution for his debts, and belong on his bankruptcy to his trustee in bankruptcy ..."

The claimant's claim had to be and was held to have failed.

Claim failed.

Solicitors : *Gurdial Singh & Co.; Nik Hussain, Ibrahim & Abdullah.*

SUN SOON HENG COACH WORKS SDN. BHD. v. NIMA TRAVEL SDN. BHD.

[O.C.J. (Shankar J.) June 12, 1985]

[Johore Bahru – Civil Suit No. 619 of 1984]

Contract – Contract for repair of bus – Delivery taken of repaired bus – Full payment not made – No complaint about defective repair at the time of delivery and considerable time thereafter – Plea of defective work on demand of full repairing charges – Plea untenable.

Evidence – Relevancy of proposals and statements in course of negotiation – Evidence Act, 1950 s. 23.

Company Law – Winding up petition by creditor on ground of inability to pay – Disputed debt – No order for Winding up – Companies Act, 1965, s. 218;

The defendants were the owners of a bus. The bus met with an accident and was extensively damaged. The plaintiff agreed to repair it for $69,180. The defendant took delivery of the repaired bus on September 23, 1983. The defendants paid $20,000 in November, 1983. Two cheques for $49,180 were given in January, 1984. Both the cheques were dishonoured. Thereafter defendants paid $5,000 in cash. On February 18, 1984, the plaintiffs' solicitors issued a statutory notice under section 218 of the Companies Act to pay the balance of $44,180 or face winding up proceedings. The defendants then for the first time wrote to the plaintiffs that the coach repaired was not in accordance to specifications and of good merchantable quality. Meanwhile defendants offered to pay the amount by instalments provided an adjustment of $1878 was made in the repair bill.

The plaintiff did not accept the proposal. Meanwhile defendants paid in cash $8000. The application for winding up came before the judge. As the debt was disputed the judge refused to make winding up order. On October 9, 1984, the plaintiffs filed a writ and on December 11 filed an application for summary judgment. The Senior Assistant Registrar gave defendants leave to defend. The judge allowed an appeal by plaintiffs against that order. The defendants counterclaimed for $33,000 as damages for breach of contract, interest and costs.

Held: (1) defendants took delivery of the bus, operated it for quite some time and never took the plea that the bus had not been repaired as per specifications;

(2) there was no failure of consideration;

(3) defendants' conduct in obstructing the plaintiff's claim amounted to an abuse of the process of the court;

(4) there was no material basis for defendant's counterclaim.

Cases referred to:

(1) *Tomlin* v. *Standard Telephones & Cables Ltd.* [1969] 3 All E.R. 201.

(2) *Sunshine Securities Pte. Ltd.* v. *Official Receiver & Liquidator of Mosbert Acceptance Ltd.* [1978] 1 M.L.J. 57.

(3) *Malayan Banking Bhd.* v. *Foo See Moi* [1981] 2 M.L.J. 17.

CIVIL SUIT.

Ong Ban Chai for the appellants/plaintiffs.
Song Teik Kim for the respondents/defendants.

Cur. Adv. Vult.

Shankar J. : On May 13, 1985, I allowed an appeal by the plaintiffs against the decision of the Senior Assistant Registrar giving the defendants leave to defend on an application for Summary Judgment. As the defendants have applied for leave to appeal against my decision to the Supreme Court, the reasons for my judgment now follow.

The defendants were at all material times and still are the owners of Bus No. WAD 4274. This bus met with an accident prior to March 21, 1983. A photograph has been produced to me to show the condition in which the bus was after the accident. It was extensively damaged. The price agreed for the repairs was $69,180. The defendants say that they then left the bus with the plaintiffs together with the drawing which contained the specifications that the repair works were required to conform to. By September 23, 1983 the plaintiffs completed the works at their premises in Johore Bahru. Mr. Su Ah Kau, a director of the defendants, came down to Johore Bahru to take